of duty and alleged that the loss and damage occasioned to the plaintiff were a result of the plaintiff's own negligence.

At the commencement of the trial, the parties announced that they had agreed on quantum, subject to liability being found against the defendant, in the sum of $34,000 in full settlement inclusive of interest.

As stated earlier the facts regarding the accident were not in dispute. What was being challenged were the inferences to be drawn and the legal interpretations to be given to the various factors which have to be taken into consideration when considering the liability of the defendant for what happened.

It must be stated that the infant plaintiff was not a very satisfactory witness but allowance had to be given for his age and it had to be accepted that he suffered injuries and damage as a result of climbing the H-pole and that was all that was needed from his evidence before considering whether the defendant was liable.

In addition to the plaintiff's evidence, one Supramaniam gave evidence. He stated that he stayed in Kampong Bharu, Bayan Lepas in 1975 and there was a footpath connecting the Kampong to the main road. The particular H-pole was adjacent to the footpath on a padi field. He stated people in the kampong where there were 150-200 houses and children used the footpath and there were three schools on the main road. He further said that the H-pole was 2½' and 3' from the footpath but there was no warning signs, no barbed wire fencing, nor spikes to prevent people climbing the poles. He also stated there were brackets which enabled people to climb. He was the one who found plaintiff lying on the ground after the accident.

The defendant's contention was it was an occupier and the plaintiff was a trespasser and as such the defendant owed no duty to the trespasser unless among other things the defendant had knowledge of the trespasser's presence and actual knowledge of conditions on the land likely to injure a trespasser unaware of the danger. In support of his proposition he relied on Lord Diplock's *dictum* in *British Railways Board* v. *Herrington.*[1] The defendant further argued that the H-pole itself was not an allurement and that the steel supports by themselves were not dangerous things. The defendant contended that the plaintiff had not discharged the burden of proof on him to establish on the footing of the principles suggested above that the defendant was liable. The defendant further maintained that it was not in breach of duty as Regulation 16 only envisages reasonable precautions to be taken and does not lay down mandatory steps.

While the contention may be attractive in considering all the circumstances of this case, the defendant cannot be considered just an occupier. The principle which should apply in this case should be more in line with the case of *Munnings & Anor.* v. *The Hydro-Electric Commission.*[2] Here it was held that the liability should be determined by reference to the standard of care owed by an undertaker maintaining a highly dangerous electrical transmission system over the land of another to which the plaintiff and other children resorted.

In this case it was admitted by the defendant through DW1 that it was aware that there was a path beside the pole which was used by the villagers including children. There is no need for the pole to be an allurement as the danger potential of the pole is so great that some form of precaution should have been considered necessary to ensure no one came to or attempted to climb the pole. The proximity of a path which led to the main road from a kampong inhabited should have made it reasonably foreseeable that people will be near the pole. Even the defendant's witness DW2 conceded it would have been prudent at least to put up a sign warning people of the danger. Yet in this case nothing had been done to warn those coming near the pole of the danger. In the case of *Buckland* v. *Guildford Gas Light and Coke Company*[3] where a child was electrocuted while climbing an easily climbed tree immediately below high-voltage electric overhead wires, it was held that the defendants as electricity undertakers owed a duty to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to injure a person so closely and directly affected by their acts or omissions that the defendants ought to have had such a person in contemplation as being so affected.

It was further held that the defendants' liability was on a different basis from that of the occupier as it arose from the duty to take reasonable care while maintaining highly dangerous overhead wires and the child's act in climbing the tree was one that should have been reasonably foreseen and she was a person to whom the defendants owed a duty to take all reasonable steps to prevent the existence of a hidden peril.

In the present case the defendant ought to have known poles in unoccupied land especially H-poles will invariably tempt children to climb them, even if it was not for the purpose of releasing birds trapped on top of them. And there was nothing whatsoever to suggest that there was imminent peril in climbing them. And the defendant had therefore not discharged their duty of care to others when installing and maintaining that H-pole.

The defendant was therefore held liable in damages to the plaintiff, and judgment was entered in the agreed sum of $34,000 for the plaintiff with costs.

Order accordingly.

Solicitors: *Kumar & Co.; Shearn, Delamore & Co.*

P.S.D. SHIPPING SDN. BHD. v. SAKURA JAYA ENTERPRISE & ORS.

[O.C.J. (Arulanandom J.) November 26, 1979 & May 16, 1981]
[Penang — Civil Suit No. 418 of 1979]

Practice and Procedure — Attachment order — Application to remove — Debtors' Ordinance 1957, s. 19.

The plaintiffs in this case applied *ex parte* for an order for attachment under the Debtors' Ordinance, 1957, section

19 against the first and second defendants. The plaintiffs claimed against the defendants freight charges incurred by the plaintiffs in transporting cargoes belonging to both defendants. The claim was disputed by the latter and they applied to remove the said order for attachment.

The second defendants contended that they had no connections with the plaintiffs whatsoever and that payments in regard to the said cargo, the consignment of stones, had already been made to the first defendant. The second defendants stated that the stones were removed to the work site and, not as alleged by the plaintiffs, to the customers' warehouses. The first defendants claimed that they had paid the plaintiffs a sum of $63,000 being the freight charges.

Held: (1) the plaintiffs had not shown utmost good faith and had not disclosed the relevant and correct facts at the time of their application for attachment;

(2) the plaintiffs must satisfy the court that the defendants "with intent to obstruct or delay the execution of any judgment" has removed or is about to remove or has concealed or is concealing or making away with or handing over to others any of their moveable or immoveable property;

(3) in the present case the plaintiffs were fully aware of the circumstances in which the defendants' goods were being removed and hence should not have misled the court into giving them the order for attachment before judgment.

Cases referred to:-

(1) *Hari Singh* v. *Sundarammal* [1965] 2 M.L.J. 174.

(2) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375, 377.

CIVIL SUIT.

K. Kumaraendran for the first defendants.

K. Balasundram for the second defendants.

V. Thevendran for the plaintiffs.

Cur. Adv. Vult.

Arulanandom J.: In this case the plaintiffs by summons-in-chambers dated October 18, 1979, applied to court for the following orders: —

"1. an Order under section 19 of the Debtors' Ordinance 1957, No. 71, that the property of the 1st and 2nd defendants be forthwith seized by the Sheriff as a pledge or surety to answer the just demand of the plaintiffs until the trial of this action and satisfaction or any judgment that may be made against the 1st and 2nd defendants; and

2. that the Costs of this Application be costs in the cause."

The grounds for the application as stated in the affidavit affirmed by one Mohd. Noor bin Md. Kamaludin the manager of the plaintiff company on the same date were as follows: —

"3. The 1st and 2nd defendants abovenamed are justly and truly indebted to the plaintiff company jointly in the sum of $34,979.70 at the time of filing the Specially Indorsed Writ.

"4. The 1st defendant by means of a Fixture Note dated 25th day of May, 1979 (hereinafter referred to as the 'said Fixture Note") expressly undertook to pay all freight charges and other incidental claim due to my company as a result of we transporting cargoes belonging to the 1st defendant from Tutikorin to Lumut by means of our vessel 'Sirdhana Fortune' which sailed from India on the 12th day of July 1979. The 2nd defendant also in consideration for my company transporting these goods from Tutikorin to Perak expressly undertook to pay a sum of $15,000 by means of a letter dated 13th June, 1979. A copy of the said 'Fixture Note' and the said letter is now shown to me and marked as exhibit 'MN-1' and 'MN-2' respectively.

5. I am informed and verily believe that both the 1st and 2nd defendants are intending to remove and are disposing of their movable property in the near future' in order to defeat my company's claim.

6. I am further informed and I verily believe that in the event my company gets judgment we cannot recover the said sum due to the plaintiffs from any other source either from the 1st or 2nd defendants."

It was an *ex parte* application and came before the Senior Assistant Registrar on a Certificate of Urgency on October 24, 1979 whereon he made an interim order and put it before the judge on November 1, 1979 when the order made by the Senior Assistant Registrar was confirmed.

On November 2 the plaintiffs filed an amended statement of claim wherein they prayed for judgment for $41,250 instead of $34,979.70 and consequential reliefs.

On November 13, 1979 the Senior Assistant Registrar issued a certificate of no appearance by the first defendant and on the same day judgment was entered against the first defendant.

On November 14 a Memorandum of Appearance was entered on behalf of the second defendant and on the same day a notice of motion was filed by the second defendant asking for the following orders: —

"(1) An Order that the Order for Attachment before judgment obtained by the plaintiffs against the 1st and 2nd defendants on the 1st day of November, 1979 be set aside;

(2) An Order that the 2nd defendant herein be at liberty to dispose of the granite stone attached at Lumut in consequence of the said Order for Attachment before judgment."

In the affidavit in support of the application one Muniandy s/o Iyappen the Resident Director of the second defendant deposes among other things that: —

"5. I deny that my company is in any way indebted to the plaintiffs for the sum of $34,979.70 or at all either jointly or ever severally.

6. I say that my company has no connections whatsoever with the plaintiffs and have never at any time negotiated with them for the carriage of the said granite from India.

7. As admitted by the plaintiffs in paragraph 7 of the amended Statement of Claim it is the 1st defendant who are the consignees of the said shipment.

8. I deny that the so-called Letter of undertaking exhibited as 'MN-2' in the affidavit of Mohd. Noor bin Md. Kamaluddin and referred to in paragraph 6 of the Statement of Claim is from my company. If at all any such letter of undertaking was to have been given to anybody then such letter of undertaking could only be signed by me as Resident Director or any of my Co-Directors from Japan.

9. My company has paid to the 1st defendant herein the full purchase monies in respect of the first consignment of stones and have made advances to them on the future shipments. Such monies totalling in all over $150,000 was paid by us in cash and a bank draft in favour of a company known as Concord Enterprise in Penang for $63,000. Our company was informed by the 1st defendant that the bank draft for $63,000 was for the debt incurred by the 1st defendant on freight charges. Copies of the bank draft, a voucher and receipt in respect of my company's payments to the plaintiffs are now shown to me and exhibited herewith marked 'MI-3', 'MI-4' and 'MI-5'.

10. My company has no knowledge who Concord Enterprise is and how freight charges were due payable to them by the 1st defendant when it is the plaintiffs who are now claiming the same as carriers.

11. ....

12. I am informed by my site manager at Lumut Naval Base and verily believe that the 1st defendant's representatives took delivery of the stones at Lumut when the same was unloaded from the Sirdhana Fortune on the 19th and 20th day of July, 1979. The stones were then immediately transported by lorries and barges belonging to my company to the work site.

13. Clearance from the port authority was immediate. I deny that the stones were ever being removed to my company's

customers warehouses. It is ridiculous for huge blocks of granite to be kept in warehouses. The granite is being now kept in the open at the site.

14. My company had taken full delivery of the stones from the 1st defendant soon after the ship's arrival at Lumut. Since then we have imported expert stone trimmers from India to trim the stones to required sizes and work is still progressing. It can thus be seen that my company is in full possession and custody of the stones and the owners thereof having paid valuable consideration.

15. The plaintiffs have wrongfully attached the granite at the work site. In the event that the stones are not delivered to the main contractors by the 28-11-1979 my company will suffer losses worth several hundred thousand dollars by reason of the fact that our contract for the supply of stones will be cancelled."

On November 16, 1979 the first defendant filed a notice of motion on a Certificate of Urgency praying for the following orders: —

"1) An Order that the judgment herein entered in default of appearance on the 13th day of November, 1979 as against the first defendant abovenamed be set aside;

2) An Order that all execution on the said judgment entered in default of appearance be stayed pending the hearing and disposal of this application;

3) An Order that an ex-parte Order for attachment before judgment obtained by the plaintiffs against the 1st and 2nd defendants on the 1st day of November, 1979 be set aside;

4) That the 1st defendant be at liberty to enter a Conditional Appearance within 10 days from the date of the extraction of this Order to be made herein;

5) That the Cost of and conditional by this application and or all proceedings to date be borne by the plaintiffs;

6) That this Honourable Court make such further and or consequential Order as it deems fit."

In the affidavit in support of the motion affirmed by one Gnanapragasam s/o Rengayah, the Managing Director of the 1st defendant on November 16, 1979 he states that the plaintiffs' claim against the first defendant is misconceived both in law and in fact and gives his reasons as follows: —

"(a) In accordance with the terms of the fixture note, the 1st defendant's liability consists of payment towards freight in the sum of $75 per ton for a total of 800 tons amounting to $60,000.

(b) That the 1st defendant has in fact paid to the plaintiff a sum of $63,000 being the freight charges in accordance with the fixture note. The payment was made by means of draft No. 68-08-16 dated the 12th day of June, 1979 drawn on Malayan Banking Bhd. in favour of Concord Enterprise.

(c) On or about the month of July, 1979 the 1st defendant received a letter from Concord Enterprise of c/o 39, 1st Floor, Chulia Street, Penang acknowledging the payment of $63,000 but demanding payment of a further sum of $17,000 which they allege was due to them. A photocopy of the letter dated the 17th day of July, 1979 from Concord Enterprise is now shown to me and marked 'G-2'.

(d) My firm has no knowledge who Concord Enterprise is and how freight charges were due payable to them by us, but from the conversation I had with Mohd. Noor bin Md. Kamaluddin during the time my firm went to see him about the freight charges, I gathered that the PSD Shipping Sdn. Bhd. would appoint a sub-agent.

(e) It is indeed strange to note that it is the plaintiffs who are now claiming and alleging that freight charges are due to them.

(f) I deny that the plaintiffs' allegations that the 1st defendant is liable to the plaintiffs in respect of incidental expenses as the same is not expressly provided in the fixture note.

(g) I further deny that the 1st defendant and the 2nd defendant are jointly and severally liable for the alleged debt and there is no contractual relationship inter se the plaintiffs and the defendants.

(h) I further believe that the 1st defendant has in fact overpaid the plaintiffs by a sum of $3,000 which I am advised is recoverable from the plaintiffs by way of a counter claim.

(i) Lastly, I verily believe and am advised that the terms of the fixture note between the plaintiffs and the 1st defendant provide for the reference of any dispute to arbitration, and that the 1st defendant is ready and willing to have the dispute referred to arbitration in accordance with the Arbitration Act."

He further denies that the first defendant is a party to the fixture note relied on by the plaintiff and goes on to allege as follows: —

"(a) The plaintiffs have failed to exhibit good faith in not having disclosed to the court facts which are pertinent to the application.

(b) I verily believe that it was within the plaintiffs' knowledge that the cargoes of granite were being removed only to facilitate handing over of the cargoes to customers of the 1st defendant and was not done with intent to defraud, obstruct, delay or frustrate the plaintiffs' claim herein. The plaintiffs have in fact acknowledged having notice of the 1st defendant's true intent and draw reference in particular to paragraph 3 of the Supplementary Affidavit.

(c) I verily believe that had not the 1st defendant handed over the cargoes to its customers as agreed, the 1st defendant might have been made liable for damages for breach of contract.

16. In view of the above, I am advised and verily believe that the plaintiff has not satisfied the requirements of section 19(1)(c) of the Debtors Ordinance, 1957."

In considering the contents of the defendants' affidavits the court was mindful of what was stated by MacIntyre J. (as he then was) in *Hari Singh* v. *Sundarammal*[1]: —

"One of the statutory requirements of which the court must be satisfied before making an order of attachment before judgment is that the plaintiff has a good cause of action. It is also settled law that on an ex-parte application, the person making the application should show the utmost good faith by not holding back any vital information touching upon matters pertinent to the application."

I was satisfied that the plaintiffs had not shown utmost good faith and had not disclosed the relevant and correct facts at the time of their application for attachment.

Furthermore as was stated by Thomson C.J. (as he then was) in *Kepong Prospecting Ltd.* v. *Schmidt*[2] that the plaintiff must satisfy the court that defendant "with intent to obstruct or delay the execution of any judgment" has removed or is about to remove or has concealed or is concealing or making away with or handing over to others any of his movable or immovable property.

In this case it is evident that the plaintiffs were fully aware of the circumstances in which the defendants' goods were being moved and hence should not have misled the court into giving them the order for attachment before judgment.

For the reasons stated above the order for attachment before judgment was set aside, judgment in default against defendants was also set aside, and defendants given leave to defend with costs.

An oral application for stay was also refused.

Order accordingly.

Solicitors: *Kumar & Co.; Balasundaram & Co.; Allen & Gledhill.*